

ORIGINAL

EX PARTE OR LATE FILED ORIGINAL

Sidney White Rhyne

ATTORNEY AT LAW

3250 ARCADIA PLACE, N.W.  
WASHINGTON, D.C. 20015-2330  
202/244-6248 FAX 202/244-4279  
SWRHYNE@ABANET.ORG

April 26, 2000

RECEIVED

APR 26 2000

FCC MAIL ROOM

Magalie Roman Salas, Esq., Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

RECEIVED

APR 26 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation  
WT Docket No. 99-87

Dear Ms. Salas:

This letter and its enclosures are filed by Global Frontiers, Inc. ("Global"), as informal comments in the above proceeding. They are filed in accordance with §§1.419 and 1206(b)(1) of the Commission's Rules. Duplicate copies of this letter and its enclosures are also being submitted as required by the rules.

The Notice of Proposed Rule Making, FCC 99-52 at ¶98, 14 FCC Rcd 5206, 5251 (1999), designated this proceeding as a "permit-but-disclose notice and comment rule making proceeding." It said that ex parte presentations would be "permitted except during the Sunshine Agenda period."

Section III (D)(1) of the Notice of Proposed Rule Making, at ¶¶58-64, was titled "Obligation To Avoid Mutual Exclusivity." It reviewed in ¶¶58-63 the Commission's analysis of its obligations under §309(j)(6)(E) of the Communications Act, added to that Act by the Omnibus Budget Reconciliation Act of 1993. The Commission asked in ¶64 for comment on whether its prior analysis was still appropriate in view of the revisions to §309(j)(1) and (j)(2) of the Communications Act in the Balanced Budget Act of 1997.

On November 24, 1999, after close of the formal comment and reply comment periods in this proceeding, Global filed a Petition for Rule Making seeking to have the 4940-4990 MHz frequency band

No. of Copies rec'd  
List ABCOE

48

Megalie Roman Salas, Esq.  
April 26, 2000  
Page 2

made available for advanced telecommunications use. At pages 13-17 of its Petition, copies of which are attached to this letter as Exhibit A, Global asserted its position on avoidance of mutual exclusivity. It stated that, in a scheme of geographic service area licensing and flexible frequency usage, where the identity of other applicants cannot be known in advance, §§309(j)(1) and (j)(6)(E) of the Communications Act require that applicants be afforded an opportunity to seek engineering solutions to mutual exclusivity through negotiation with competing applicants after their short form applications have been filed and before being sent to auction.

Global attached to its Petition, as part of Exhibit No. 3 at pages 15-16, suggested language that it believed would make competitive bidding procedures in that licensing scheme compliant with §§309(j)(1) and (j)(6)(E). Copies of those pages are attached to this letter as Exhibit B.

On February 29, 2000, the Commission released a Notice of Proposed Rulemaking (FCC 00-63 in WT Docket No. 00-32), in which it granted Global's Petition to the extent indicated therein and sought comment on a number of issues related to a proposed assignment of the 4940-4990 MHz frequency band to Part 27 of the Rules, using a scheme of geographic service area licensing and flexible permitted frequency usage. In ¶93 of the February 29 Notice, the Commission said it had "recently sought comment on the scope and content of the Commission's obligation under Section 309(j)(6)(E)," citing to this proceeding in a footnote. It went on to say that it "intended to adhere to any conclusions reached [in this proceeding] regarding the scope of our auction authority, in light of our conclusions concerning our obligations under Section 303(j)(6)(E)."

In Global's Comments filed this day in WT Docket No. 00-32, it has again addressed the Commission's statutory obligation to afford applicants an opportunity to develop engineering solutions to mutual exclusivity through negotiation, in the context of the proposed rules for the 4940-4990 frequency band. Copies of pages vii and 5-11 of Global's Comments, addressing that issue, are enclosed with this letter as Exhibit C.

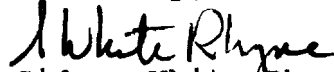
Since the conclusions that the Commission reaches in this proceeding as to its statutory obligations under §309(j)(1) and (j)(6)(E) will apparently control its response to Global's contentions in WT Docket No. 00-32 that the Commission has a statutory obligation to afford applicants for authorizations in the

Megalie Roman Salas, Esq.  
April 26, 2000  
Page 3

4940-4990 MHz band an opportunity to achieve negotiated engineering solutions to mutual exclusivity, Global asks that its views expressed in Exhibits A, B and C to this letter be considered in this proceeding.

Global's full Petition and Comments are, of course, available in WT Docket No. 00-32. They may be considered for the context in which Exhibits A, B and C were submitted, and for information about Global and its interest in the 4940-4990 MHz frequency band and the subject matter of this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Sidney White Rhyne". The signature is written in a cursive, flowing style.

Sidney White Rhyne  
Counsel for Global Frontiers, Inc.

SWR/wp  
Enclosures

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
PETITION FOR RULE MAKING )  
OF GLOBAL FRONTIERS, INC. )  
 )  
To Revise Title 47, Chapter I, )  
Parts 2 and 26, Code of Federal )  
Regulations, in Order To Reallocate )  
Frequencies to GWCS and Make )  
Related Changes )

RM No. \_\_\_\_\_

To: The Commission

**PETITION FOR RULE MAKING**

Sidney White Rhyne  
3250 Arcadia Place, N.W.  
Washington, D.C. 20015-2330  
202/244-6248 Fax 244-4279  
swrhyne@abanet.org

November 24, 1999

**EXHIBIT A**  
to Ex Parte Presentation  
in WT Docket No. 99-87

if the Commission is able to make the eligibility and public interest determinations required by the rules.

D.     The Commission Should Encourage Avoidance of Mutual  
          Exclusivity through Negotiated Engineering Solutions

A major failing of the present GWCS rules, a failing which creates the potential for needless delay in new service to the public and makes the rules facially inconsistent with statute, is their failure to provide for negotiated engineering solutions to problems of mutual exclusivity. Moreover, late last year the rules were revised to incorporate into §26.205 the prohibition in §1.2105(c) of the general competitive bidding rules on cooperation, collaboration and discussion among applicants after their short form applications have been filed. *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, ET Docket No. 94-32, FCC 98-212, Fourth Report and Order, Appx. C at p.3 (released Sept. 24, 1998). This effectively eliminated any possibility that such engineering solutions could be found.

Applicants should be *encouraged* to talk to each other, once those interested in a particular frequency block in an EA have been identified, to see if they cannot work out ways in which they can co-exist and bring both services to the public. These sorts of consultations already take place among applicants for satellite authorizations who at first filing are mutually exclusive. They should not only be permitted but encouraged among GWCS applicants.

Petitioner has proposed, in Exhibit No. 3, new §§26.201(b)(2) and (c) that require the Commission, promptly after the closing date for filing of applications for any frequency block in an EA, to identify for all applicants the names and addresses of all competing applicants so they can engage in consultation, discussion, collaboration and exchange of information for the purpose of determining whether mutual exclusivity can be avoided by engineering solutions. The proposed new rules provisions also establish a procedure for up to a 90-day delay in any auction upon request of applicants, to permit such consultations, and for a determination by the Commission upon information submitted by the applicants whether mutual exclusivity has been avoided so that all applications can be granted. Cross references to the new provisions of §26.201 have been added to §§26.304, 26.316, 26.319 and 26.321.

The Commission has an obligation under the Communications Act to help applicants avoid mutual exclusivity through "negotiation" and "engineering solutions." Petitioner's new §§26.201(b)(2) and (c) in Exhibit No. 3 recognize that obligation and provide a means by which it can be discharged. In fact, unless and until that obligation is discharged, the statute confers no right on the Commission to grant a license through competitive bidding.

Subsection (j) of §309 of the Communications Act, titled "Use of competitive bidding," is the statute from which the Commission derives its power to award licenses through competitive bidding. It was added to the Communications Act by the Omnibus Budget Reconciliation Act of 1993. Under a heading in the first para-

graph titled "General authority," Subsection(j) granted the Commission the power to select among qualified but mutually exclusive applicants "through the use of a system of competitive bidding *that meets the requirements of this subsection*" (emphasis added). It stated in relevant part:

"General authority. If mutually exclusive applications are accepted for filing for any initial license or construction permit ... the Commission shall have the authority ... to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection."

Thus, it conferred no power to use competitive bidding except as the exercise of that power meets the requirements of Subsection (j). One of those requirements is an "obligation" by the Commission to "avoid mutual exclusivity" through the use of "engineering solutions" and "negotiation." See ¶(6)(E) of Subsection (j):

"(6) Rules of construction. Nothing in this subsection, or in the use of competitive bidding, shall--

" ...

"(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."

In the Balanced Budget Act of 1997, Congress amended Subsection (j) of §309 of the Communications Act to make the use of competitive bidding procedures for the award of licenses to mutually exclusive applicants mandatory in most in-

stances, instead of permissive only. However, in doing so, it made even more plain that had the 1993 Act that this power is limited by the obligation imposed by paragraph (6)(E) to seek to avoid mutual exclusivity through negotiation and engineering solutions. The General Authority paragraph was amended to read in relevant part:

"General authority. If, *consistent with the obligations described in paragraph (6)(E)*, mutually exclusive applications are accepted for filing for any initial license or construction permit ... the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection" (emphasis added).

The language here italicized made clear that Congress was focused even more strongly than in 1993 on holding the Commission to its obligation to seek to avoid mutual exclusivity through negotiations and engineering solutions. The Conference Report that accompanied the 1997 Act (H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572) stated:

"[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity."

As recently as March of this year, the FCC recognized this expression of concern by the Congressional conferees "that the Commission not interpret its expanded

auction authority in a manner that overlooks engineering solutions or other tools that avoid mutual exclusivity." *Implementation of §§309(j) and 337 of the Communications Act*, WT Docket No. 99-87, FCC 99-52, 14 FCC Rcd 5206, 5220 ¶19 (1999).

E. The Commission Should Permit Avoidance of Mutual Exclusivity through Geographic Partitioning

One way, though by no means the only way, to resolve problems of mutual exclusivity through negotiation and engineering solutions is by geographical partitioning of the territory within an EA. At present, partitioning is limited by the GWCS Rules to rural telephone companies. 47 CFR §26.209.

More than four years ago in February 1995, suggesting the broad outlines for a new GWCS, the Commission proposed to permit all licensees with Commission approval to partition their service areas geographically. First Report and Order and Second NPRM, cited at p.5 *supra*, 10 FCC Rcd 4769 at 4808, ¶80. Though the rules adopted in Part 26 did not so provide, three years ago in December 1996 the Commission issued another NPRM in which it suggested that "allowing more open partitioning of GWCS licensees may add flexibility to the service and allow the spectrum to be used more efficiently." *Geographic Partitioning and Spectrum Disaggregation*, WT Docket No. 96-148, FCC 96-474, Report and Order and Further NPRM, 11 FCC Rcd 21831 at 21876 ¶96. One year ago, in November 1998, the Commission denied a petition to allow partitioning by all GWCS licensees saying that the issue would be resolved in the 1996 proceeding. *Allocation of Spectrum*

Petition for Rule Making  
Of Global Frontiers, Inc.

**EXHIBIT NO. 3**

Part 26 of Title 47 CFR, Showing  
Revisions Proposed by Petitioner

**EXHIBIT B**  
to Ex Parte Presentation  
in WT Docket No. 99-87

fixed location on these islands that may cause interference to the operations of the Arecibo Observatory in services in which individual station licenses are not issued by the FCC; or planning a modification of any existing station at a permanent fixed location on these islands that would increase the likelihood of causing interference to the operations of the Arecibo Observatory must notify the Interference Office, Arecibo Observatory, Post Office Box 995, Arecibo, Puerto Rico 00613, in writing or electronically (e-mail address: prcz@naic.edu), of the technical parameters of the planned operation. Carriers may wish to use the interference guidelines provided by Cornell University as guidance in designing facilities to avoid interference to the Observatory. The notification must include identification of the geographical coordinates of the antenna location (NAD-83 datum), the antenna height, antenna directivity (if any), proposed channel and FCC rule part, type of emission, and effective isotropic radiated power.

(b) In services in which individual station licenses are issued by the FCC, the notification required in paragraph (a) of this section should be sent at the same time the application is filed with the FCC, and at least 20 days in advance of the applicant's planned operation. The application must state the date that notification in accordance with paragraph (a) was made. In services in which individual station licenses are not issued by the FCC, the notification required in paragraph (a) of this section should be sent at least 45 days in advance of the applicant's planned operation. In the latter services, the Interference Office must inform the FCC of a notification by an applicant within 20 days if the Office plans to file comments or objections to the notification. After the FCC receives an application from a service applicant or is informed by the Interference Office of a notification from a service applicant, the FCC will allow the Interference Office a period of 20 days for comments or objections in response to the application or notification.

(c) If an objection to any planned service operation is received during the 20 day period from the Interference Office, the FCC will take whatever action is deemed appropriate.

### **Subpart E - Competitive Bidding Procedures for GWCS**

#### **§ 26.201 GWCS subject to competitive bidding.**

(a) Mutually exclusive initial applications to provide GWCS service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q, will apply unless otherwise provided in this part.

(b) Notwithstanding anything to the contrary in the general competitive bidding procedures in Part 1, such procedures will not be employed if:

(1) There is a single bidder for a frequency block or blocks in an Economic Area, so that mutual exclusivity does not exist. In that case the Commission shall, promptly after the closing date for filing applications to participate in the FCC auction, notify the single bidder and ask that it promptly submit the long form application required by §26.305(b). Thereupon, if the Commission can make the favorable determinations required by §§26.302(a) and 26.322(a), then subject to §1.2108 it shall forthwith grant an instrument of authorization to that bidder.

(2) The Commission can determine that all applications by eligible applicants for a frequency block or blocks in an Economic Area may be granted without conflicts such as are described in §26.321 that render applications mutually exclusive. Consultations, collaboration, discussions, and exchange of information among applicants after the closing date for the filing of their applications regarding their

intended uses of the frequencies, for the purpose of ascertaining whether mutual exclusivity can be avoided by engineering solutions, and which do not seek dismissal or withdrawal of any application for payment or other consideration, shall not be deemed to contravene the prohibition of "collusion" among applicants in §1.2105(c). Engineering solutions may include partitioning of geographic portions of an Economic Area based on any boundaries agreed to by all applicants for the same frequency block or blocks in the Economic Area. Upon request to the Commission by all applicants for a frequency block or blocks in an Economic Area, an auction as to such frequencies shall be postponed for ninety days to permit such consultation, or until earlier notified by the applicants that no engineering solution to mutual exclusivity is possible, at which time the Commission shall promptly reinstitute competitive bidding procedures and schedule an auction. Upon a determination by all such applicants that they can file long form applications that are not mutually exclusive, they shall each submit the long form application required by §26.305(b). Thereupon, if the Commission can determine from the applications that they are not mutually exclusive, and that the applicants or any of them is otherwise eligible to receive an authorization under §26.302, and can make the additional favorable determinations as to all such eligible applicants that are required by §§26.302(a) and 26.322(a), then subject to §1.2108 the Commission shall forthwith grant an instrument of authorization to each eligible applicant. If the Commission cannot make the required determinations as to all eligible applicants, it shall reinstitute competitive bidding procedures and schedule an auction. No auction shall be held for a frequency block or blocks in an Economic Area as to which long form applications by all potential bidders asserting an absence of mutual exclusivity are pending, until such time as the Commission has made a determination that none of the applications is grantable without holding an auction, but if not all of the applications are grantable without competitive bidding, the Commission shall proceed to hold an auction for those applicants that it has determined are mutually exclusive, for an authorization that is consistent with whatever engineering solution has been agreed to by them that avoids mutual exclusivity with the grantable application.

(c) In order to assist applicants in seeking engineering solutions that will avoid mutual exclusivity, the Commission shall, promptly after the closing date for filing applications for any frequency block in an Economic Area, notify all applicants for that frequency block of the names and addresses of all other applicants for the same frequency block, so the applicants can if they choose engage in the consultations, collaboration, discussions, and exchange of information contemplated by §26.202(b).

#### **§ 26.202 Competitive bidding design for GWCS licensing.**

(a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide GWCS service:

- (1) Simultaneous multiple round auctions
- (2) Sequential oral auctions

(b) The Commission may design and test alternative procedures. The Commission will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

(c) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
The 4.9 GHz Band Transferred from ) WT Docket No. 00-32  
Federal Government Use )

To: The Commission

## COMMENTS OF GLOBAL FRONTIERS, INC.

**Sidney White Rhyne**  
3250 Arcadia Place, N.W.  
Washington, D.C. 20015-2330  
202/244-6248 Fax 244-4279  
[swrhyne@abanet.org](mailto:swrhyne@abanet.org)

Counsel for Global Frontiers, Inc.

April 26, 2000

**EXHIBIT C**  
to Ex Parte Presentation  
in WT Docket No. 99-87

## SUMMARY

Global Frontiers, Inc. ("Global"), supports regulation of the 4940-4990 MHz frequency band under Part 27 with provisions proposed by the Commission for flexible use of that spectrum to enable licensees to deploy advanced communications capability. Housekeeping changes, some of which are suggested in these Comments, will be needed to integrate the new frequency band into Part 27.

Also, Global strongly urges that Part 27 conform to the Commission's statutory authority by affording applicants an opportunity for negotiation to achieve engineering solutions to mutual exclusivity after short form applications are filed.

To facilitate the broadband uses necessary to advanced telecommunications services, the Commission should not limit bandwidth. Thus, both spectrum blocks and limits on aggregation should be rejected. If channelization should be employed, the channel blocks should be as large as possible. Pairing should not be mandated, since it would unnecessarily restrict flexibility of use.

Geographic service areas, if employed, should be the Economic Areas now provided in Part 26 of the Rules. In-band interference should be controlled by imposing at service area boundaries the same field strength limit now provided in Part 26, based on the proximity of the frequency bands and the similarity of services provided under Part 26 and proposed for 4940-4990 MHz under Part 27.

indeed the appropriate long form, or even more important if it is not, a specific reference to the correct form by number should be made in §27.206(c), similar to the numerous references in §§27.204 and 27.210(c) to submission of a "short-form application (Form 175)."

## **II. The Commission Is Required by Statute To Provide For Avoidance of Mutual Exclusivity Through Negotiation and Engineering Solutions**

The other principal diversion in the NPR from the proposals in Global's Petition was in the Commission's failure to endorse Global's contention that the Communications Act requires that applicants be afforded an opportunity to devise engineering solutions to mutual exclusivity through negotiation prior to being sent to auction. Global requested that the Commission fulfil its obligation imposed by §309(j)(6)(E) of the Act by to use engineering solutions and negotiation to avoid mutual exclusivity, by providing an opportunity for applicants to negotiate such solutions after filing their short-form applications. See pp. 13-17 of Global Petition and ¶¶12 and 93 of the NPR. Global suggested regulatory language that would afford that opportunity to applicants. See pp. 15-16 of Exhibit No. 3 to Petition.

In ¶93 of the NPR, the Commission responded to Global's request by saying it intended to adhere to whatever conclusions it reached as to its obligations under §309(j)(6)(E) in a pending rule making proceeding it had initiated in March 1999.

See Notice of Proposed Rule Making , Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, FCC 99-52, WT Docket No. 99-87, 14 FCC Rcd 5206 (1999). In that March 1999 Notice ("BBA NPRM"), the Commission sought comment on a wide range of issues arising from Title III ("Communications and Spectrum Allocations") of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (Aug. 5, 1997). One section of the BBA NPRM (¶¶58-64 on pp. 5235-39) was devoted to the "Obligation to Avoid Mutual Exclusivity."

As noted in ¶60 of the BBA NPRM, and also on page 16 of Global Frontiers' Petition, the Balanced Budget Act retained the Commission obligation to avoid mutual exclusivity through use of negotiation and engineering solutions. That obligation had been added as part of paragraph (6)(E) of §309(j) of the Communications Act when Congress in 1993 first authorized selection among mutually exclusive applicants by auction. Congress further highlighted that obligation in 1997 by adding to §309(j), in the introductory paragraph providing the general authority for auctions, a special requirement that acceptance of any mutually exclusive applications and grant of a license or permit to an applicant by competitive bidding be "consistent with the obligations described in paragraph (6)(E)." See 111 Stat. 258 (1997).

The Conference Report that accompanied the 1997 Balanced Budget Act said the reason for this added language was to "emphasize" that the Commission "must"

assure compliance with its obligations under paragraph (6)(E), and that it not "minimize" those obligations, "thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity." H.R. Report No. 105-217, p.572 (July 30, 1997). A letter the next year to the Chairman of the Commission signed by the Senate Minority Leader, three other Senators from both parties, all with seats on the Communications Subcommittee of the Senate Commerce Committee, and the Chairmen of the House Commerce Committee and its Telecommunications Subcommittee, asserted that the explanation Congress had provided for the 1997 change was "unambiguous." It expressed concern that the Commission had, since the 1993 Act was passed, "frequently ignored this provision of the law." Referring to the special reference to paragraph (6)(E) added to the statement of auction authority in the 1997 Act, the letter said:

"Congress did not engage in an idle act when it legislated this change. It did so for a reason. The Commission must not ignore what Congress enacted by reading this provision out of the law and adopting policies inconsistent with statutory requirements."

See letter of December 28, 1998, referred to in footnote 172 to ¶60 on page 5235 of the BBA NPRM.

As indicated in ¶¶61-63 of the BBA NPRM, the Commission had indeed, between the enactment of the 1993 Act and its amendment in 1997, felt unconstrained by §309(j)(6)(E) where it deemed the establishment of geographic area licensing to be in the public interest, notwithstanding its greater potential for mutual exclusivity

than site-by-site licensing with frequency coordination. Whether the language of the 1997 amendment, read in light of the Conference Report, was "unambiguous" as asserted in the Congressional Letter, and whether it resolved the "precise question" of whether the Commission has authority to use a geographic licensing scheme notwithstanding its greater potential for creating mutual exclusivity, is something the Commission will now have to resolve in a manner that it concludes will withstand review under *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984), as applied to the pre-1997 version of §309(j) in *Fresno Mobile Radio v. FCC*, 165 F.2d 965, 968 (D.C. Cir. 1999).

But, assuming the Commission can determine to its satisfaction that it is not operating in excess of its statutory authority when it uses a geographic licensing scheme such as that in Part 27 of its Rules, it must certainly recognize that the amended §309(j)(1) and §309(j)(6)(E) are accorded no recognition at all if the rules make no provision for, and indeed expressly forbid, applicants for geographic area permits to negotiate with each other and propose engineering solutions to mutual exclusivity before being forced into auctions. Yet that would be exactly the situation if Part 27 is not amended at least generally in line with the amendment suggested for Part 26 on pages 13-14 of Global Frontiers' Petition and pages 15-16 of Exhibit No. 3 to that Petition. Granting permits and licenses by competitive bidding without such an amendment would clearly be in excess of statutory authority, without even a nod toward avoidance of mutual exclusivity.

Particularly with respect to a frequency band for which the Commission is making only a "broad and general allocation" to "*any* fixed or non-aeronautical mobile service use," so "licensees will be able to offer a wide range of services employing varying technologies" (NPR at ¶19, emphasis added), there is no way that potential applicants can know the identity of all other potential applicants before they file their "short form" applications. So there is no possibility until the applications are filed for any comprehensive negotiation looking to engineering solutions that avoid mutual exclusivity.

At the point where short form applications have been filed, not only is there no provision in the rules for negotiation looking toward engineering solutions, it is **expressly forbidden**. Section 27.204 (c), titled "Prohibition of collusion," states that except in certain instances, which are not applicable to negotiation to try to achieve engineering solutions to mutual exclusivity, "all applicants are prohibited from "cooperating, collaborating ... or discussing or negotiating settlement agreements."

Thus, without amendment, the applicants would be required to go to auction even though an auction might be able to be avoided by working out an engineering solution that would eliminate mutual exclusivity. It is impossible to reconcile that requirement of an auction irrespective of the availability of an engineering solution with the statutory authority given by Congress to the Commission, in §309(j)(1) of

the Communications Act, to grant licenses by auction only if "consistent with the obligations described in paragraph (6) (E)."

Paragraph (6)(E) places the Commission under an obligation "to use engineering solutions [and] negotiation ... in order to avoid mutual exclusivity." It is also impossible to reconcile an auction in these circumstances with the recognition by the Commission itself, in the "Big LEO Report and Order" cited in ¶61 n.179 of the BBA NPR, that it construes 309(j)(6)( E) "to mean that the Commission is obliged to attempt to eliminate mutual exclusivity." 9 FCC Rcd 5936 at ¶71. See also the Commission's action approving an orbital assignment plan for space stations, described in the Order by the Chief of the International Bureau as a "direct result of the applicants' successful efforts to resolve their conflicts over orbital locations for satellites in all portions of the world." *Assignment of Orbital Locations to Space Stations in the Ka-Band*, DA 97-967 at ¶2 (May 9, 1997).

The statutory problem regarding applicants in the 4940-4990 MHz Band could be solved if the Commission, upon receipt of multiple applications for a particular frequency block in a particular geographic area, were to (1) notify all applicants of the identity of the other applicants, and (2) pause for a reasonable time before accepting the applications, in order to permit the applicants to confer with one another to see if an engineering solution to mutual exclusivity can be worked out. Global Frontiers has suggested a consultation period of ninety days, upon request of

the applicants. The ninety day period could be shortened if the applicants, before the end of the period, advised the Commission that no engineering solution to mutual exclusivity was possible.

If, on the other hand, the applicants should be able to arrive at what they deemed to be an engineering solution to mutual exclusivity, they would present that proposed solution to the Commission with long form applications. The Commission could then make its own determination as to whether the applications were not mutually exclusive, and hence acceptable and grantable without an auction. See ¶¶(b) and (c) on pages 15-16 of Exhibit No. 3 to Global Frontiers' Petition, which could be added with conforming changes to §27.201 of the Rules.

In the absence of the addition of some such procedure for negotiation among applicants and engineering solutions to mutual exclusivity, Global Frontiers suggests that the Commission would be plainly acting in excess of the authority given it by Congress. The Commission should recognize that and provide in Part 27 for a period of negotiation and consultation among applicants to avoid mutual exclusivity. In order to assure compliance with the statute, it should do this even if the BBA NPRM proceeding should not be concluded by the time it is ready to act in this proceeding, or if it should be concluded in a way that fails to address situations such as will be presented if the 4940-4990 frequency band is broadly allocated for flexible uses such as is proposed in the NPR.